46TH CONGRESS, 2d Session. } SENATE. { REPORT No. 357.

IN THE SENATE OF THE UNITED STATES.

MARCH 12, 1880.—Ordered to be printed.

Mr. JONAS, from the Committee on Private Land Claims, submitted the following

REPORT:

[To accompany bill S. 890.]

This is a bill proposing to grant compensation to the several persons (or their legal representatives), who when the military authorities of the United States took possession and entered into the occupancy of the lands above high-water mark, within the present limits of the military reservation at Point San José, in the city of San Francisco, in the State of California, were in the possession of portions thereof, and who now claim to be indemnified for the lands and the improvements thereon, of which they were deprived when said lands and improvements were so taken possession of.

The land and premises known as Point San José, in the city of San Francisco, now in possession of the United States, and held for military purposes, is part of a larger tract of the public domain, which by order of the President of the United States, on the 5th of November, 1850, modified December 31, 1851, was reserved for public uses, and set apart from sale and private entry.

Since its actual occupation by the government, fortifications and public buildings have been erected upon it, and it is now considered to be a valuable and important post and essential to the defense of the harbor of San Francisco.

The claimants say that they, through their author (one Leonidas Haskell), were in the actual possession of a portion of this property on the 1st of January, 1855, and so continued to be until October 2, 1863, when under an order issued by General Halleck, commanding the Department of California, military possession was taken of Point San José, and the persons then in possession were summarily dispossessed.

Claimants derived title from said Haskell, and have produced their title deeds.

The foundation of Haskell's alleged title is as follows:

In 1852, the city of San Francisco presented to the Board of Land Commissioners (established by act of Congress of March 3, 1851), her claim for confirmation of four square leagues of land (a pueblo right), of which Point San José, the tract now in question, containing about 50 acres, formed a part. The board confirmed a portion of the city's claim, embracing therein Point San José, and rejected another portion. Whereupon both the United States and the city appealed to the district court of the United States for the district of California.

On the 30th of March, 1857, the appeal taken by the United States was discontinued for reasons not disclosed by the record.

Prior to this date, that is in June, 1855, San Francisco had by ordinance relinquished all the city's rights in and to the lands in question to the parties who were in actual possession of them on the 1st day of January, 1855, and this ordinance of the city of San Francisco was ratified by the legislature of California, by act passed March 11, 1858. Haskell claimed to have been in possession of a portion of this property on the 1st of January, 1855, and his title would have been perfected, provided there was any title in the city of San Francisco.

The city of San Francisco prosecuted its appeal from the decision of the land commissioners, and this appeal was decided in the United States circuit court for the district of California (to which it had been removed under the authority of an act of Congress), on the 31st of October, 1864.

The court ordered that

> A decree be entered confirming the claim of the city of San Francisco to a tract of land situated in the county of San Francisco, and embracing so much of the peninsula upon which the city is located as will contain an area equal to four square leagues as described in the petition. *From the confirmation will be excepted such parcels of land within said tract* as have been *heretofore reserved* or dedicated to public use by the United States, or have been by grant from lawful authority vested in private proprietorship,

and the final decree was entered accordingly May 18, 1865.

On this trial, claimants allege that the order of President Fillmore of 1850, and the modified order of 1851, reserving the promontory of San José for public use, was first brought to their knowledge.

An appeal was taken to the Supreme Court of the United States, but pending the appeal, on the 8th of March, 1866, Congress passed "An act to quiet the title to certain lands within the corporate limits of the city of San Francisco" (14th Statutes, 4), by which the title of the city was confirmed, subject to the exceptions and reservations contained in the said decree of the circuit court.

Upon the passage of this act, which finally settled the question of title, the appeal was dismissed. Subsequently one of the dispossessed occupants of the Point San José reservation, brought suit to test the title of the United States, and this suit was finally decided by the Supreme Court of the United States in 1867, the court holding that the title to this land had never passed out of the United States. (See Grisar *vs.* McDowell, 6th Wallace, p. 363.) The organ of the court, Mr. Justice Field, said: The decree of the circuit court, thus modified by the act of Congress of March 8, 1866, "excepts from confirmation to the city such parcels of land as had been previously reserved or dedicated to public use by the United States. By the parcels thus named reference is had to the tracts reserved by the orders of President Fillmore. One of these tracts, as we have said, contains the premises in controversy. The decree therefore settles the title to them against the plaintiff. Whoever obtained conveyances from the city, or asserted title under the Van Ness ordinance while the claim of the city to the land thus conveyed, or to which title was thus asserted, was pending before the tribunals of the United States, necessarily took whatever they acquired subject to the final determination of the claim. Their title stood or fell with the claim, for the decree took effect by relation as of the day when the petition of the city was presented to the board of land commissioners. It is to be treated in legal effect as if entered on that day."

The claimants having failed to establish title through the courts, now ask relief, and set up what they consider to be strong equitable grounds for such action by Congress.

The authority of the President to reserve the lands for public use

does not appear to be here disputed. It has been sanctioned by repeated acts of Congress, and immemorial usage.

The question, however, can be of but little importance, for as the Supreme Court say in the Grisar case, "the lands remained the property of the United States, whether or not they were by sufficient authority appropriated to public uses."

Claimants contend that the order of the President making the reservation was pigeon-holed for 13 years, and it was even said in argument that there was no proof attainable that it had ever been furnished to the surveyor-general of California.

An affidavit of Mr. Brooks is much relied on. He is a searcher of titles, and examined the title to the Point San José property, for different parties, one of them being Mr. Steinbach, one of the present claimants. His testimony shows that he had heard that the property had been reserved and that such was a general rumor, but because after a somewhat superficial search he failed to find the order, he took it for granted and advised his clients that the reservation had been abandoned and the lands restored to private entry.

It does not appear that he examined the records of the surveyor-general's office at all, and he could have obtained full and satisfactory information by addressing either the War Department or the Commissioner of the General Land Office at Washington.

It will hardly be pretended that the government could be prejudiced by the laches of any of its officers or agents, but the evidence shows no laches.

The records of the General Land Office show—

1. The President's order dated November 6, 1850, reserving seven described tracts from sale in California, Point San José being part of the first tract.

2. Copy of a letter from the General Land Office, dated June 24, 1851, advising the United States surveyor-general of California *of said reservation*, and a letter from the said surveyor-general, *dated August* 7, 1851, *acknowledging receipt of said order of reservation.*

3. Letter of General Totten, dated November 17, 1851, to the Commissioner of the General Land Office, with diagram inclosed, showing approximate limits of Point San José Reservation, by President's order, and the modified limits recommended to the President by the Chief of Engineers and Secretary of War, and copy of letter from the Commissioner to the surveyor-general, *dated December* 2, 1851, transmitting copy of said letter of General Totten and the inclosed diagram. Copies of all of these documents are on file, and they show that the surveyor-general of California was promptly notified of the reservation and that he received the notification before the city of San Francisco had even made her application to the board of land commissioners.

It seems to have been in evidence in the case of Grisar *vs.* McDowell, that the order of President Fillmore was, in June following, transmitted by the Commissioner of the General Land Office to the surveyor-general of California, "in whose office it has ever since remained on file." This is stated in the opinion of the court (page 371, 6th Wallace).

It is also shown that, although the surveyor-general did not receive the President's modified order until 1864, he had been informed of it, and furnished with a description by General Totten in 1853.

Claimants also contend that the dismissal of the appeal of the United States from the land commissioners to the district court, had the effect of a final adjudication in favor of the city of San Francisco, and that

they had a right to consider, and actually did consider, the question settled, so far at least as the Point José lands were concerned.

The same point was made in the Grisar case. In their opinion the court say:

> The counsel of the plaintiffs contend that this decree closed the controversy between the city and the United States, as to the lands to which the claim was confirmed. But in this view they are mistaken. Had the city accepted the leave granted, withdrawn her appeal, and proceeded under the decree as final, such result would have followed. But this course she declined to take. She continued the appeal for the residue of her claim to the four square leagues. *This kept open the whole issue with the United States.* The proceeding in the district court, though called in the statute an appeal was not in fact such. It was essentially an original suit, in which new evidence was given, and in which the entire case was open.
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> The dismissal of the appeal on the part of the United States did not, therefore, preclude the government from the introduction of new evidence in the district court, or bind it to the terms of the original decree (6th Wallace, 375).

In the case of the United States *vs.* Ritchie, 17th Howard, 533, Mr Justice Nelson delivering the opinion of the court held, that such a suit was to be regarded as an original proceeding, and that the removal of the transcript, papers, and evidence into it, from the board of commissioners, was the mode provided for its institution in that court.

> The transfer, it is true (said the court in that case), is called an appeal. We must not, however, be misled by a name, but look to the substance and intent of the proceeding. The district court is not confined to a mere re-examination of the case as heard and decided by the board of commissioners, but hears the case *de novo*, upon the papers and testimony, which had been used before the board, they being made evidence in the district court, and also upon such further evidence as either party may see fit to produce.

These decisions confirm your committee in their opinion that neither the claimants nor the United States were prejudiced by the dismissal of the appeal, and it is a strange claim for equitable relief that parties thought that they had obtained possession of a valuable and essential government reservation through the carelessness or oversight of the government law representative, and found themselves deceived.

Your committee do not find that claimants have suffered loss through any fault or act of omission or commission on the part of the United States Government or its officers, and do not think that they are entitled to any compensation for the lands which they occupied and used for some years without any title.

As it is alleged, however, that during their occupancy of the lands they erected buildings and made improvements which have been found valuable and useful to the United States, your committee recommend the payment to claimants of whatever value may have accrued to the United States by the possession and use of these improvements.

Your committee therefore report the bill with such amendments as will permit the claimants to establish the value to the United States of the improvements placed by them upon the lands, and to recover the same, and thus amended, they recommend its passage.

This recommendation is the same as that made by this committee at the last session of the Forty-fifth Congress, they having had a similar bill under consideration. (See report of Mr. Bayard, accompanying Senate bill No. 3, Forty-fifth Congress, printed by error as from Judiciary Committee.)

In all other respects your committee recommend that the claim be rejected.

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